No. 86-869

Supreme Court, U.S.
FILED
OCT 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

VINCE D'ANGELO, PETITIONER,

vs.

DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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QUESTION PRESENTED

1. Whether the lack of clearly defined standards for the imposition of sanctions against an attorney in disciplinary proceedings allows the administration of penalties that are unduly harsh and/or arbitrary, thereby permitting the penalizing body (the New Mexico Supreme Court) to impose penalties which deprive the disciplined attorney of due process of law, and the equal protection of the laws, as guaranteed by the Fourteenth Amendment of the United States Constitution?

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IN THE SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1986

No. _____

VINCE D'ANGELO, PETITIONER

vs.

DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

Vincent D'Angelo, Petitioner, petitions for a writ of certiorari to review the judgment of the New Mexico Supreme Court in this case.

OPINONS BELOW

The opinion of the New Mexico Supreme Court is unofficially reported at 25 State Bar of New Mexico Bulletin No. 39, Page 829 (September 25, 1986). A copy of the unofficial opinion is included in the appendix. The opinion has not yet officially been published in New Mexico Reports (N.M.) or in Pacific Reporter (P.2d). The New Mexico Supreme Court's denial of Petitioner's Motion for a Rehearing is also included in the appendix.

JURISDICTION

The judgment sought to be reviewed was issued by the New Mexico Supreme Court. The Disciplinary Board of the Supreme Court of New Mexico submitted a Decision and Recommendation to the New Mexico Supreme Court on April 30, 1986. Petitioner appealed the Board's decision to the New Mexico Supreme Court, which affirmed in an opinion issued July 28, 1986. Rehearing was denied September 15, 1986. A Motion for Stay was granted for a period of sixty days from August 29, 1986, to allow Petitioner to perfect his appeal to the United States Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (1982).

CONSTITUTIONAL PROVISION INVOLVED

1. The fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT

Disciplinary charges were brought against Vince D'Angelo alleging violations of several disciplinary rules. A formal hearing was held before the Hearing Committee for the Disciplinary Board of the Supreme Court of the State of New Mexico, pursuant to Rule 14, Rules of Procedure for Disciplinary Proceedings. The Committee adopted Findings of Fact, finding that Petitioner had violated Rules 10102(A)(1), 5-101(A),5-104(A)(4), and 7-101(A)(3), N.M. Stat. Ann. Code of Prof. Resp. (Rep. Pamp. 1985). The Committee Recommended that Petitioner be suspended from the practice of law for six months, with automatic reinstatement.

A panel of three members of the Disciplinary Board reviewed the Findings and Recommendation, were presented with post-hearing briefs submitted by the parties and held oral argument, pursuant to Rule 15 of the Rules for Disciplinary Proceedings. The Panel Recommended to The New Mexico Supreme Court that Petitioner be suspended for a period of twelve months with automatic reinstatement; and prior to reinstatement, that Petitioner take the multistate ethics examination and correctly answer 75% of the questions. The New Mexico Supreme Court, after hearing oral arguments (Rule 16 of the Rules for Disciplinary Proceedings), adopted the findings and recommendations of the Disciplinary Board panel. 25

State Bar of New Mexico Bulletin No. 39, at 830 [*hereinafter*, Opinion (referenced to the Appendix)].

In adopting the findings of the Committee and the Board, the Supreme Court found that Petitioner and his associate undertook representation of Margaret O'Rourke-Brennan in a variety of matters throughout 1979 (Opinion, p.1). Petitioner was the owner and president of a small construction corporation known as Nacon, Inc. *Id.* In mid-1980, Petitioner introduced Ms. O'Rourke-Brennan to a Nacon employee for the purpose of discussing a possible investment in a fourplex. *Id.* Ultimately, she became unhappy with the progress of the project, and upon her request, Petitioner released her from the contract (Transcript of Proceedings, pp. 70, 71, 239). Due to Ms. O'Rourke-Brennan's withdrawal, and other unforeseen complications, the project failed and Petitioner declared bankruptcy. Ms. O'Rourke-Brennan later sued for malpractice and to recover her investment (Opinion, p. 7, n.2).

During the disciplinary proceedings, Petitioner cooperated fully with the Disciplinary Board. Despite his efforts to deal fairly and honestly, and to make amends, the Board ignored his good behavior in recommending punishment. The New Mexico Supreme Court adopted the recommendation without comment and refused a rehearing on the harshness of the discipline.

The New Mexico Supreme Court relied on, and adopted, the Disciplinary

Board's recommendation that Petitioner be suspended for one year. There is no specific Rule of disciplinary procedure dealing with the recommendation of sanctions by the hearing committee. Because the New Mexico Supreme Court has never established uniform standards for the imposition of sanctions, the present system permits arbitrary or discriminatory application to disciplined attorneys.

Rather, the rules provide only that the responding party to formal charges be: advised of the charges, Rule 10(a); notified of the identity of the committee members, Rule 10(c); informed of the time and place of the committee hearing, Rule 14(b); afforded the right to representation by counsel and to cross-examine witnesses, Rule 14(d); and notified of the committee's findings and recommendations. The Disciplinary Board and the New Mexico Supreme Court may then either accept, reject, modify or increase the committees recommended sanctions. Rules 15 and 16, Rules of Disciplinary Proceedings.

ARGUMENTS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

APPLICATION OF ARBITRARY AND VAGUE STANDARDS FOR THE IMPOSITION OF SANCTIONS DEPRIVED PETITIONER OF DUE PROCESS OF LAW

The constitutional rights of lawyers relative to their license to practice law have been consistently recognized. *Mattis v. Supreme Court of Pennsylvania*, 576 F. Supp. 1178, 1182 (W.D. Penn. 1983). In civil proceedings, "[a]n essential principle of due process is that a deprivation of life, liberty or property be proceeded by notice and opportunity for hearing appropriate to the nature of the case [cite omitted]." *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 1493 (1985). Although standards of procedure must be flexible, the degree of vagueness tolerated depends on the nature of the proceedings and the rights at stake. *Hopkins v. Mayor and Council of the City of Wilmington*, 600 F.Supp. 542, 553 (D.Del. 1984). This Court has recognized in criminal proceedings that the vagueness doctrine requires not only actual notice of prohibited conduct but also standards that are definite enough to prevent arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d. 903 (1983). The lack of standards in New Mexico governing the imposition of discipline deprives attorneys of due process of law because of the resulting uneven and arbitrary imposition of sanctions that affect their livelihood.

No criteria exists that informs attorneys under what specific circumstances

they might be subjected to a particular sanction under Rules 14, 15 and 16 of the New Mexico Supreme Court Rules Governing Discipline (Rep. Pamp. 1985). Nor are there stated guidelines for imposing sanctions provided by the Disciplinary Board beyond the general purpose of disciplinary action. That purpose is to protect the public, the profession and the administration of justice, and not to punish the person disciplined. Preface, N.M. Sup. CT. Rules Governing Discipline (Rep. Pamp. 1985); *In Re Nelson*, 79 N.M. 779, 450 P.2d 188 (1969). As a result of this vagueness, the degree of discipline imposed for violations of the Professional Code has varied greatly. *See e.g.*, *Matter of Dilts*, 93 N.M. 131, 597 P.2d 316 (1979) (attorney's independent judgment impaired by conflicting interests, unintentionally aiding an embezzlement scheme warranted 30-day suspension); *Matter of Markley*, 101 N.M. 565, 686 P.2d 255 (1984) (filing claim beyond statute of limitation, then raising same case on frivolous appeal; failure to properly handle real estate sales and warranty conveyances of real property; warranted public censure and twelve month probation); *Matter of Chakares*, 101 N.M. 684, 687 P.2d 741 (1984) (attorney filed brief containing false, misleading, inaccurate and improper statements in a lawsuit; engaged in same behavior before disciplinary board, warranting public censure and a fine).

In light of the above disciplinary measures and the apparent lack of uniform application of discipline, Petitioner's sanction of twelve month's

suspension is both arbitrary and excessively harsh. In adopting the Disiplinary Board's recommendation, the New Mexico Supreme Court failed to address even the most general purpose of discipline protecting the public and profession rather than punishing the attorney when it suspended Petitioner for twelve months. This Court, if ordering certiorari from the New Mexico Supreme Court, could prevent the continuation of unconstitutional deprivation of property by notifying the New Mexico Supreme Court of the degree of notice and certainty of standards that must be met by the State Supreme Court and its Disciplinary Board in their regulation of the legal profession.

CONCLUSION

This Petition for Writ of Certiorari should be granted because the ruling in the New Mexico Supreme Court deprived Petitioner of his livelihood through an impermissibly vague application of standards for imposing sanctions, in a manner that contradicts the purpose of disciplinary action.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

IN THE MATTER OF

VINCE D'ANGELO,

ATTORNEY AT LAW No. 15,906

DISCIPLINARY PROCEEDINGS

Harris L. Hartz
Albuquerque, NM for Board

William S. Dixon
Albuquerque, NM for Respondent

APPENDIX A

OPINION

Per Curiam.

This matter having come before this Court on March 10, 1986, after completion of disciplinary proceedings conducted pursuant to NMSA 1978, Rules Governing Discipline (Repl.Pamp.1985), wherein attorney Vince D'Angelo (D'Angelo) was found to have engaged in acts of misconduct in violation of NMSA 1978, Code of Prof. Resp. Rules 1-102(A)(1),

5-101(A), 5-104(A), 7-101(A)(3) (Repl.Pam.1985), the Court adopts the findings and recommendations of the Disciplinary Board. Those findings are summarized as follows:

1. D'Angelo undertook representation of Margaret O'Rourke (O'Rourke) in June of 1979 concerning a workmen's compensation claim and other matters. Throughout 1979, O'Rourke consulted with D'Angelo and his associate, Don Vigil, on a variety of legal matters. O'Rourke sought a lump sum payment of workmen's compensation benefits, and Mr. Vigil filed suit on her behalf in this matter in October, 1979. O'Rourke also sought assistance in obtaining social security benefits, in getting out of a contract to purchase a water softener, in possibly pursuing a wrongful death action, and in preparing a will for her and a trust for her children. At all times material to the instant action, an attorney-client relationship existed between O'Rourke and D'Angelo's law firm.

2. D'Angelo was the owner and president of a New Mexico corporation known as Nacon, Inc., (Nacon) which was organized in 1979 for the purpose of constructing office buildings, multi-family dwellings and acting as a general contractor. In May or June of 1980, D'Angelo introduced O'Rourke to one of Nacon's employees, Wayne Pirtle (Pirtle), for the purpose of discussing a possible investment by O'Rourke in a fourplex to be constructed by Nacon. D'Angelo failed to disclose to O'Rourke that he

was the owner and president of Nacon. D'Angelo further failed to disclose the background of Pirtle and the fact that Pirtle had just been released from prison on a felony conviction.[1] D'Angelo failed to advise O'Rourke of the risks of the investment of her funds in Nacon and that Nacon had no substantial assets. He also failed to prepare mortgages or other security instruments to protect the interests of O'Rourke in the investment of her funds in Nacon. D'Angelo failed to advise O'Rourke that her interests could conflict with his interests and that she was free to seek other legal counsel to advise her in the Nacon transaction.

3. O'Rourke ultimately relinquished $90,000 to Nacon at the inception of the contract. O'Rourke, who thought D'Angelo to be her attorney and protecting her interests in her dealings with Nacon, asked D'Angelo if the contract was satisfactory. D'Angelo informed her that it was a standard contract and everything was in order. At the closing, O'Rourke was required to supply a certificate of deposit to be used as collateral for her $90,000 bank note. Again, believing that D'Angelo was acting as her attorney, O'Rourke inquired of him if this was customary procedure. D'Angelo informed her that she needn't worry, everything was proper.

4. For various reasons, O'Rourke's fourplex was never completed and

[1]Pritle's conviction was subsequently set aside.

she lost her $90,000 investment.[2]

5. D'Angelo's actions in entering into a business transaction with a client without full disclosure were in violation of Rules 1-102(A)(1), 5-101(A), 5-104(A), 7-101(A)(3) of the Code. The Disciplinary Board recommended that Vince D'Angelo be suspended for a period of one year.

In attacking the Board's recommendation, D'Angelo argues that the hearing committee's findings of fact are unsupported by clear and convincing evidence, that there was no attorney-client relationship existing between D'Angelo and O'Rourke at the time of the transaction between O'Rourke and Nacon (D'Angelo's corporation), and that D'Angelo's conduct was ethical throughout. We disagree.

D'Angelo argues that the standard of proof in disciplinary proceedings is clear and convincing evidence. The board apparently believed that the standard of proof required was that of clear and convincing evidence. The Board's counsel argued to the Court that the evidence in the record met the standard of clear and convincing evidence and recommended D'Angelo's suspension. Clear and convincing evidence must "instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that

[2] In subsequent civil action against D'Angelo, O'Rourke has recovered her full $90,000 investment.

the evidence is true." *In re Sedillo*, 84 N.M. 10, 12, 498 P.2d 1353, 1355(1972).

We have reviewed the record and agree that the evidence in this case meets the test required for clear and convincing evidence. However, we believe the Board applied the incorrect standard.

From 1916 to 1983, the standard of proof that was utilized was clear and convincing evidence. *See In re Marron*, 22 N.M. 252, 160 P. 391 (1916). This standard of proof was previously adopted by court rule and appears at Supreme Court Rule 3, NMSA 1953, Section 21-2-1(3), Paragraph 1.10 (Supp.1961). This rule stated in pertinent part:

> To warrant a finding of misconduct in contested cases, the facts must be established by clear and convincing evidence.

The rule and statutory section were renumbered (*see* NMSA 1953, Repl. Vol. 4 (1970) Section 18-4-8(c) (Supp.1975)), but the standard remained the same. Then, on April 15, 1983, Rule 8 was withdrawn when the attorney disciplinary system in New Mexico was revised, leaving no express statement by court rule as to the standard of proof in disciplinary proceedings. Thus, the requirement for a standard of proof in disciplinary proceedings of clear and convincing evidence is supported by case law decided under a now repealed rule. This former standard conflicts with the reasoning of this Court in the recent case of *Foster v. Board of Dentistry*,

_____ N.M. _____, 714 P.2d 580 (1986). In *Foster* this Court stated in pertinent part that:

> [I]t is only where allegations such as fraud are involved or where the clear and convincing burden has been established by statute that such a higher burden is allowed in civil cases.

Id. at _____, 714 P.2d at 582. Thus, absent an allegation of fraud or a statute or court rule requiring the higher standard, the standard of proof in administrative hearings is a preponderance of the evidence. Since *Foster* did not involve any allegations of fraud or a statute specifying that the standard should be clear and convincing in cases under the Uniform Licensing Act, this Court determined that the standard in such cases was a preponderance of the evidence.

It is true that many disciplinary cases involve allegations of fraudulent conduct and thereby, under *Foster*, a clear and convincing standard of proof is appropriate. However, other disciplinary cases (such as the instant case), do not involve fraud and therefore, under *Foster*, the usual standard of proof is to be applied. In disciplinary proceedings where fraud has not been alleged, the standard of proof is a preponderance of the evidence. In this case, we reiterate that the record on appeal meets the clear and convincing evidence standard, which *includes* the lesser standard of a preponderance of the evidence, to support the Board's recommendation of suspension.

The evidence at the hearing supports the finding that an attorney-client relationship existed between D'Angelo and O'Rourke. D'Angelo never clearly stated to O'Rourke that he was not acting as her attorney, O'Rourke reasonably believed that D'Angelo was acting as her attorney and protecting her interests in the Nacon transaction, and more importantly, D'Angelo's own intention was to act for O'Rourke in the Nacon transaction. D'Angelo stated at the hearing that "she [O'Rourke] didn't need a lawyer. I was going to look out for her, at least that was my feeling and my attitude at all points."

The evidence is that D'Angelo never made a full disclosure to O'Rourke regarding his involvement in Nacon. The testimony at the hearing was that O'Rourke may have known that D'Angelo owned Nacon because Nacon had its office adjacent to the D'Angelo law firm offices and, various parties, including D'Angelo, told O'Rourke that D'Angelo had bought a construction company. Again, this evidence meets both standards. However, even if O'Rourke knew that D'Angelo owned and was president of Nacon, this is not enough to meet the requirements of Rules 5-101(A) and 5-104(A). Rule 5-104(A) "prohibits an attorney from entering into a business transaction with a client where the attorney and the client have differing interests and where the client would expect the attorney to exercise his professional judgment for the client's protection *unless the*

inherent problems are disclosed to the client and his informed consent obtained." *In re Chowning,* 100 N.M. 375, 376, 671 P.2d 36, 37 (1983) (emphasis added). An attorney has as affirmative duty to fully inform a client, not only of the attorney's interest in the transaction, but also how such interest might affect the attorney's personal judgment and that the client is free to seek outside legal advice regarding the transaction. This was not done in the instant case.

Thus, based upon the evidence that as attorney-client relationship existed during the time of the transaction herein involved, and the fact that D'Angelo did not give full disclosure to O'Rourke in his business dealings with her, we determine that D'Angelo's conduct does not meet the ethical standards required of a member of the New Mexico Bar and IT IS THEREFORE ORDERED that:

Vince D'Angelo be suspended from the practice of law in the State of New Mexico for a period of (12) twelve months effective August 15, 1986 and, prior to being readmitted, D'Angelo be required to take the Multistate Professional Responsibility examination and receive a passing grade of at least seventy-five percent (75%); and that costs of this action in the amount of $2,661.93 be paid by D'Angelo to the Disciplinary Board no later than September 15, 1986.

IT IS SO ORDERED.

William Riordan, Chief Justice

William R. Federici, Justice

Harry E. Stowersk, Jr., Justice

Mary C. Walters, Justice
(not participating)

Dan Sosa, Jr., (Dissenting)

SOSA, Senior Justice, Dissenting.

With the majority opinion in this matter, I disagree for two reasons:

First, I have difficulty in concluding that the evidence is clear and convincing on the existence of an attorney-client relationship at all material times.

Second, and more importantly, I must take issue with the movement of the majority away from clear and convincing evidence as the standard of proof in a disciplinary proceeding such as this, where a person's reputation and very livelihood are at risk. I believe that the property interest in a professional license is entitled to due process protections of the Constitution of the United States and New Mexico. I am troubled, therefore, by the decision of this Court to jettison a body of case law dating back to 1916, simply because a rule of this Court has been withdrawn. The majority incorrectly implies that case law has followed the rule. In fact the opposite is true. Supreme Court Rule 3, paragraph 1.10 was only adopted by this court on August 22, 1960, some 44 years after our precedent had been established. Compiler's notes, NMSA 1953 Comp.

I did not participate in *Foster v. Board of Dentistry*, _____ N.M. _____, 714 P.2d 580 (1986), on which the majority relies for lowering the standard of proof in licensing proceedings from clear and convincing evidence to a preponderance of the evidence. The majority recognizes that

Foster conflicts with the traditional standard which all parties had assumed was applicable in the case at bar. In this context, the *Foster* decision is erroneous as to both precedent and policy. In my judgment, *Foster* does not expressly overrule our case law dating back to 1916. Moreover, the portion of *Foster* which lowers the standard of proof is not part of the holding of the case, but is merely dicta, in the nature of an advisory opinion, which is not the proper method to introduce such a drastic revision of our legal doctrine.

The present case does expressly overturn our precedents, even though it could have been decided and the same result reached without such disruption. I cannot concur with the lowering of the burden on those who seek to cancel a professional license. Obviously, the public needs to be protected against misdeeds of lawyers. Such misdeeds, however, should be proven by a clear and convincing standard. A lawyer also has some rights, particularly when his license to practice his chosen profession is in jeopardy. Therefore, I must object to the imposition of a standard of proof which endangers those rights.

For the foregoing reasons, I respectfully dissent.

DAN SOSA, JR., Senior Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Monday, September 15, 1986

NO. 15,906

IN THE MATTER OF

VINCE D'ANGELO,

ATTORNEY AT LAW

This matter coming on for consideration by the Court upon Motion of Petitioner for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Petitioner is hereby denied.

ATEST A TRUE COPY

_____

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Monday, September 15, 1986

NO. 15,906

IN THE MATTER OF

VINCE D'ANGELO,

ATTORNEY AT LAW

This matter coming on for consideration by the Court upon Motion for Stay for a period of sixty days in order to perfect an appeal to the United States Supreme Court, and the Court having considered said Motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion for Stay is hereby granted for a period of sixty days from August 29, 1986, to allow the Respondent to perfect his appeal to the United States Supreme Court. Respondent is to notify this Court of the date of the filing of his petition, and the acceptance or denial of the petition for certiorari by the United States Supreme Court.

ATTEST A TRUE COPY

_____

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C